82142-9

~~NO. 82973-0~~

SUPREME COURT OF THE STATE OF WASHINGTON

LINDA CUNNINGHAM and DOWNEY C. CUNNINGHAM,
a marital community,

Appellants,

v.

RONALD F. NICOL, M.D.; VALLEY RADIOLOGISTS, INC., P.S.,
and MULTICARE HEALTH SYSTEM, INC.,
d/b/a COVINGTON MULTICARE CLINIC,

Respondents..

BRIEF OF RESPONDENT MULTICARE HEALTH SYSTEM, INC. D/B/A COVINGTON MULTICARE CLINIC

Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466
WILLIAMS, KASTNER & GIBBS PLLC

Attorneys for Respondent MultiCare Health System, Inc. d/b/a Covington MultiCare Clinic

Two Union Square
601 Union St., Suite 4100
Seattle, WA 98101
(206) 628-6600

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

RULES

OTHER AUTHORITIES

I. INTRODUCTION

Appellate courts consider constitutional arguments raised for the first time on appeal only upon a showing of manifest constitutional error. RAP 2.5(a)(3). The Cunninghams neither make nor support any argument on appeal that the 90-day waiting period in RCW 7.70.100 or the eight-year statute of repose provision in RCW 4.16.350 is unconstitutional standing alone.[1] Rather, the constitution-based arguments that they offer on appeal amount to an argument that the 90-day waiting period requirement in RCW 7.70.100(1) is unconstitutional as applied to them because of how it interacted with the eight-year repose provision in RCW 4.16.350. The Cunninghams cite no authority for the proposition that the application of two statutes that are constitutional can produce a result that is unconstitutional. The Supreme Court does not address constitutional arguments that are inadequately briefed, and should decline to consider the Cunninghams' arguments.

Unless the Court holds in *Waples v. Yi*, No. 82142-9, that RCW 7.70.100 is unconstitutional and unenforceable, it should affirm the dismissal of the Cunninghams' complaint even if it considers their constitutional arguments, which amount to inadequately preserved "as-

[1] Even in the trial court, the Cunninghams conceded the constitutional validity of RCW 4.16.350's statute of repose, stating: "the validity of the subject statute of repose is beyond challenge." CP 162.

applied" challenges to the way RCW 7.70.100(1)'s notice of intent to sue requirement and RCW 4.16.350's eight-year repose provision combined and interacted as to them. The repose provision does not confer a *right* to wait a full eight years to sue; it establishes a maximum length of time in which one may sue for an injury-causing negligent act or omission in health care. Thus, the way RCW 7.70.100 interacted with the repose provision in the Cunninghams' case, where they could have, but inexplicably did not, give notice of intent to sue more than 90 days before the expiration of the statute of repose, does not present issues of constitutional proportion. The Court should neither extend the repose period for the Cunninghams nor excuse their noncompliance with RCW 7.70.100.

II. COUNTERSTATEMENT OF THE ISSUES

1. Have the Cunninghams adequately preserved and briefed the constitutional arguments they make on appeal?

2. If the Cunninghams' constitutional arguments have been adequately preserved and briefed, is the notice of intent to sue requirement (or the 90-day waiting period) of RCW 7.70.100(1) unconstitutional under the state "open courts" provision, state or federal equal protection or due process provisions, or the separation of powers doctrine because the

Legislature did not provide in RCW 7.70.100(1) for an extension of the eight-year statute of repose provision of RCW 4.16.350?

III. COUNTERSTATEMENT OF THE CASE

Linda Cunningham underwent imaging studies of her head on August 24, 2000. CP 4-5. The Cunninghams filed a medical malpractice lawsuit against MultiCare, radiologist Dr. Ronald Nicol, and Valley Radiologists, Inc., P.S., on August 20, 2008. CP 3. They allege that the August 24, 2000 imaging studies were negligently read as normal, causing a delay in the diagnosis of a brain tumor until February 2008. CP 5.

RCW 7.70.100(1) requires a waiting period of 90 days after giving notice of intent before suit can be commenced. The Cunninghams say they filed suit 15 days after giving notice of intent so as not to sue after expiration of the eight-year repose period imposed by RCW 4.16.350. CP 161-62 *and see* CP 6. In their complaint, the Cunninghams asked for a declaratory ruling to resolve "contradictions" between RCW 7.70.100(1)'s 90-day waiting period and the eight-year repose period. CP 6.

In response to a motion brought by Nicol and Valley Radiologists to dismiss for noncompliance with the 90 day waiting period, CP 58-65, in which MultiCare joined, CP 69-73, the Cunninghams filed a document styled as "consolidated motions" for a continuance and for "summary judgment on claim related implications of statutory conflicts pertaining the

statute of abrogation/repose, RCW 4.16.350," CP 81-87. In their "consolidated motions," the Cunninghams argued that the repose provision and RCW 7.70.100(1) "conflict," or are "contradictory," that the notice of intent requirement "shortens" the repose period and denies "essential rights guaranteed by the Constitution of the State of Washington," CP 83-84, and that "the statutory conflicts must be resolved in favor of access to our courts," CP 86-87, but they did not otherwise argue that either the 90-day waiting period provision in RCW 7.70.100(1) or the eight-year repose provision of RCW 4.16.350 is unconstitutional. The Cunninghams asked the superior court to defer ruling on defendants' motion to dismiss until this Court decides "the pending *Putman* matter set for argument on February 24, 2009," CP 82 (referring to *Putman v. Wenatchee Valley Med. Ctr., P.S.*, Washington Supreme Court No. 80888-1), CP 84, and purported to "incorporate" and summarize" arguments made by the *Putman* petitioners, CP 163-164, contending under a heading entitled "Plaintiffs' motion for summary judgment," CP 84, that a decision in *Putman* "will likely shed specific light" on issues they were raising concerning the statute of repose, CP 86. The Cunninghams never explained how *Putman* might do so even though it concerned the constitutionality of RCW 7.70.150, not RCW 7.70.100, and presented no issues under the statute of repose.

The superior court denied the Cunninghams' motion to wait for this Court's decision in *Putman*, CP 185-86, and dismissed the complaint, CP 188-90. The Cunninghams timely appealed the order dismissing their complaint. CP 191-97.

IV. ARGUMENT

A. The Cunninghams' Appeal Should Be Rejected Because They Rely on Constitution-Based Arguments That Were Not Preserved and That Are Inadequately Briefed on Appeal.

In March 2009, this Court granted review in *Waples v. Yi, No. 82142-9*, in which the petitioners challenge RCW 7.70.100(1) on several constitutional grounds. The Cunninghams also complain about RCW 7.70.100(1) and make constitution-based arguments. But, the *Waples* petitioners argue that RCW 7.70.100(1) is unconstitutional on its own and thus unenforceable; the Cunninghams' argument is that they suffered deprivations of constitutional rights, not because RCW 7.70.100(1) is unconstitutional on its face, but rather because they were unable to comply with its 90-day waiting period requirement and also commence suit within the eight-year repose period established by RCW 4.16.350.[2] The Cunninghams' brief does not specify what ruling they want the Court to

[2] The Cunninghams' argument in that regard ignores the fact that the Cunninghams could have given notice of intent to sue more than 90 days before the expiration of the eight-year statute of repose. They admittedly knew of their claim in February 2008, and did not have to wait until August 4, 2008 (21 days before the statute of repose barred their suit) to give notice of intent to sue.

make, except it appears they want the Court to come up with a way to reinstate their lawsuit.

It is unlikely that the Supreme Court will decide this appeal before it decides *Waples v. Yi*. If the Court holds in *Waples* that RCW 7.70.100(1) is facially unconstitutional, the result would be that the statute is void. *See City of Redmond v. Moore*, 151 Wn.2d 664, 669, 91 P.3d 875 (2004) ("The remedy for holding a statute facially unconstitutional is to render the statute totally inoperative"). Such a decision would presumably save the Cunninghams from any inadequately preserved or otherwise-deficient constitution-based arguments.

If this Court concludes in *Waples* that RCW 7.70.100(1) is facially constitutional, what would be left for the Court to consider and decide in this appeal would be the Cunninghams' argument that the interplay between RCW 7.70.100(1) and the repose period imposed by RCW 4.16.350 produced an unconstitutional or unjust result in their case even though neither statute is unconstitutional. For the reasons set forth below, the superior court's ruling dismissing the Cunninghams' medical malpractice lawsuit for noncompliance with the 90-day waiting period requirement of RCW 7.70.100(1) should be affirmed.

B. The Cunninghams' Arguments that the Interplay Between RCW 7.70.100(1) and RCW 4.16.350, Deprived Them of Constitutional Rights Were Not Preserved for Review, Are Inadequately Briefed on Appeal, and Are Without Merit.

1. The Cunninghams did not challenge either RCW 7.70.100(1) or RCW 4.16.350 on constitutional grounds in the superior court.

In the superior court, the Cunninghams did not argue that either the waiting-period provision in RCW 7.70.100 or the 8-year repose provision of RCW 4.16.350 is unconstitutional. Rather, they argued that the repose provision and RCW 7.70.100(1) "conflict," or are "contradictory," and that "the statutory conflicts must be resolved in favor of access to our courts." CP 86-87. The "access to courts" argument was not framed in constitutional terms, nor was it supported by citation to authority. The Cunninghams also asked the superior court to defer ruling on defendants' motion to dismiss until the Supreme Court decides "the pending *Putman* matter set for argument on February 24, 2009," CP 82, and they purported to "incorporate" and summarize" arguments made by the *Putman* petitioners, CP 163-164. *Putman* (which this Court decided on September 17, 2009) did involve constitutional arguments (two of which the Court addressed), but it concerned RCW 7.70.150, not RCW 7.70.100(1), and the Cunninghams did not explain why or how any argument made in *Putman* concerning RCW 7.70.150 might apply to RCW 7.70.100(1), or

what a decision in *Putman* would mean for purposes of their discussion of the repose provision in RCW 4.16.350.

2. The Cunninghams have inadequately briefed their argument that RCW 7.70.100(1) and RCW 4.16.350 combined to produce an unconstitutional result in this case.

Appellate courts consider constitutional arguments raised for the first time on appeal only upon a showing of manifest constitutional error. RAP 2.5(a)(3). The Cunninghams fail to cite RAP 2.5(a)(3) and, as more fully explained in Part IV-A of the Brief of Respondents Nicol and Valley Radiologists, in which Respondent MultiCare joins, the arguments the Cunninghams raise on appeal do not involve any manifest error affecting a constitutional right. Moreover, the Supreme Court does not address constitutional arguments that are not adequately briefed. *Havens v. C&D Plastics, Inc.*, 124 Wn.2d 158, 169, 876 P.2d 435 (1994).

Because the Cunninghams' argument amounts to an contention that application of both RCW 7.70.100(1) and RCW 4.16.350 is unconstitutional *in their case*, their appeal is an "as-applied" challenge to the constitutionality of both statutes, rather than a "facial" challenge to either statute. As the Court has explained,

> An as-applied challenge to the constitutional validity of a statute is characterized by a party's allegation that application of the statute in the specific context of the party's actions or intended actions is unconstitutional. . . . Holding a statute unconstitutional as-applied prohibits

> future application of the statute in a similar context, but the statute is not totally invalidated. . . . In contrast, a successful facial challenge is one where no set of circumstances exists in which the statute, as currently written, can be constitutionally applied.

City of Redmond, 151 Wn.2d at 668-69 (citations omitted). The Cunninghams offer no argument and cite no authority for the proposition that two constitutionally valid statutes can, when applied at the same time, produce an effect or result that violates any one or more of the four constitutional guarantees discussed in their brief ("access to courts"; equal protection; due process; separation of powers). The Cunninghams' constitution-based arguments are therefore inadequately briefed, and need not be and should not be considered at all. *Havens*, 124 Wn.2d at 169. If this Court does consider the Cunninghams' constitution-based arguments, it should reject each of them for the reasons set forth below.

3. The Cunninghams fail to demonstrate beyond a reasonable doubt that the result of applying RCW 7.70.100(1) and the eight-year repose provision in RCW 4.16.350 to them is unconstitutional.

a. Statutes are presumed to be constitutional.

As set forth in Part IV-B-1 of the Brief of Respondents Nicol and Valley Radiologists, in which Respondent MultiCare joins, statutes are presumed to be constitutional and the burden is on the party challenging a statute to prove beyond a reasonable doubt that the statute is

unconstitutional. *E.g.*, *Island County v. State*, 135 Wn.2d 141, 146, 955 P.2d 377 (1998).

b. The interaction between the waiting provision of RCW 7.70.100(1) and the repose provision of RCW 4.16.350 does not deny the Cunninghams a constitutionally guaranteed "right to a remedy for a wrong suffered," because there is no such right.

According to the Cunninghams, "a right to a remedy for a wrong suffered" is expressed in Const., art. I, § 10 and is recognized by *King v. King*, 162 Wn.2d 378, 388, 174 P.2d 659 (2007). *App. Br. at 9.* As set forth more fully in Part IV-B-4 of the Brief of Respondents Nicol and Valley Radiologists, in which Respondent MultiCare joins, Const. art. I, § 10 is not a "right to a remedy" provision and, even if it were, the Cunninghams have not shown how the notice of intent to sue provision of RCW 7.70.100(1) violates it.

The notion of an unconditional or "unconditionable" constitutional "right to a remedy" is a recurrent dream and refrain of the plaintiffs' bar. Existing legislation, case law, and court rules, however, tightly regulate and sometimes present insurmountable barriers to the successful exercise of legal remedies. The notice of intent to sue requirement of RCW 7.70.100(1) requires no more than the mailing of a letter. The successful prosecution of a civil damages lawsuit, by contrast, requires a prefiling investigation that satisfies CR 11, filing in the proper court of a written

complaint that alleges facts stating a viable claim, properly effected service of process on each defendant, payment of a filing fee, naming of proper and indispensable parties, and compliance with case scheduling orders and discovery rules. Sufficient admissible evidence – which in medical malpractice cases includes expert testimony to prove negligence and causation – must be presented to avoid summary dismissal. Sufficient admissible and persuasive evidence also must be presented to a finder of fact that ignores press coverage and avoids other types of misconduct. Judgment untainted by uninvited trial court error must be entered. And so forth. No party is entitled to the assistance of counsel in a private tort lawsuit, and even parties with lawyers can find their cases dismissed for failing to navigate past one of these procedural shoals.

Simply complaining that the legislature has imposed yet another hurdle is not an argument worthy of judicial consideration, and courts should not give more serious contention to such an argument simply because it is dressed up in constitutional rhetoric. The Cunninghams' Const. art. I, § 10 argument is too superficial to support an as-applied challenge to the interaction between RCW 4.16.350 and RCW 7.70.100(1) in their case.

c. The interaction between notice-of-intent and repose statutes does not deny the Cunninghams equal protection of the law.

(1) The Cunninghams fail to demonstrate that RCW 7.70.100(1) and RCW 4.16.350, either alone or in combination, treat similarly situated classes of persons dissimilarly.

To challenge a statute on "equal protection" grounds under Const. art. I, § 12, one must first establish that the statute treats two "similarly situated" classes of people unequally. *Fell v. Spokane Transit Auth.*, 128 Wn.2d 618, 635, 911 P.2d 1319 (1996). There is no equal protection violation when persons of different classes are treated differently. *Forbes v. Seattle*, 113 Wn.2d 929, 943, 785 P.2d 431 (1990). The Cunninghams assert, *App. Br. at 11*, that, "without justification" and thus in violation of Const. art. I, § 12, RCW 7.70.100's 90-day waiting period requirement creates a subclass of plaintiffs alleging medical malpractice who "attempt[ ] to provide the mandatory [intent-to-sue] notice within the last ninety days before the expiration of their legal rights under the applicable statute or repose," and that RCW 7.70.100 "imposes a mandatory requirement only upon plaintiffs with legal claims arising from health care negligence."

It may be true that the notice of intent requirement applies to medical malpractice claimants but not tort claimants generally but the Cunninghams offer no reasoned argument why the persons in those two

classes should be considered similarly situated even though they have different kinds of personal injury claims. Washington for many years has treated plaintiffs wishing to bring medical malpractice claims differently from plaintiffs wishing to bring other kinds of tort claims. For example, a plaintiff suing a health care provider must prove different things in order to prevail under RCW chapter 7.70 than someone suing a product seller or manufacturer must prove under RCW chapter 7.72. A medical malpractice claimant may not prevail without proving fault. RCW 4.24.290. A product liability claimant can recover without proving fault. RCW 7.72.030(1)(a) and (b); *Falk v. Keene Corp.*, 113 Wn.2d 645, 782 P.2d 974 (1989). The right of someone suing for a slip-and-fall injury depends on how he or she came to be on the premises where the fall occurred.[3] A tort victim who has contributory fault recovers less than his or her full damages compared to a tort victim with the same injury who is not at fault,[4] unless he or she was under the age of six when injured.[5] A claimant seeking recovery from the State is subject to the requirements of

[3] *See Egede-Nissen v. Crystal Mountain, Inc.*, 93 Wn.2d 127, 131, 606 P.2d 1214 (1980) (declining to adopt a uniform standard of landowner liability and discard the traditional set of "categorical" standards of landowner care that depend on whether the injured person was an invitee, licensee, or trespasser).

[4] RCW 4.22.070(1).

[5] *See* WPI 11.03 and decisions cited in the Comment thereto.

nonclaim statutes to which someone suing a private party is not. *See Daggs v. Seattle*, 110 Wn.2d 49, 750 P.2d 626 (1988).

More importantly for purposes of their as-applied challenge to RCW 7.70.100(1)'s 90 day waiting period requirement, the Cunninghams offer no argument as to why claimants who "attempt" to give notice of intent to sue within 90 days before expiration of the repose period should be considered to be situated similarly to those who "attempt" to give notice of intent to sue more than 90 days before expiration of the repose period. Indeed, the Cunninghams could have provided notice of intent to sue more than 90 days before expiration of the repose period, and they have never offered any explanation for why they failed to do so,[6] or why their failure to do so renders RCW 7.70.100(1) as applied to them unconstitutional.

The Cunninghams' equal protection argument seems to be that RCW 7.70.100(1) as applied to them created a "class" whose members are treated differently from similarly-situated medical malpractice claimants who enjoy the protection of the full, eight-year repose period provided by RCW 4.16.350. If that is their argument, it proceeds from a false premise that the repose provision confers some type of "right." To the contrary, the repose provision establishes an outer limit of eight years – 96 months –

[6] *See* footnote 2, *supra*.

on the length of time in which a lawsuit for medical malpractice may be commenced after the alleged negligent act or omission. It does not foreclose the application and enforcement of any number of common law or statutory requirements that could operate to shorten that 96-month period to, say, 93 months.

A medical malpractice claim accrues when the negligent act or omission occurs, and is time-barred unless suit is commenced within three years, or 36 months, afterward. RCW 4.16.350(3). RCW 4.16.350's one-year "discovery rule" limitations period enables a minority of persons with medical malpractice claims to sue months or even years after the three-year limitations period has expired. The Cunninghams claimed the benefit of the discovery rule. The Cunninghams' complaint was dismissed notwithstanding their late-discovery claim (and without rejecting it) because they sued without having waited the required 90+ days after giving notice of intent to sue.

The one-year discovery rule does not operate and never has operated to extend the *repose* period of eight years. Thus, even without the notice-of-intent-to-sue statute, a plaintiff who discovers a malpractice claim seven years and 364 days after receiving negligent health care loses the right to sue unless he or she is able to commence suit within one day, which is impossible for most claimants to do. Thus, whether suit can be

commenced, as a practical matter, within the eight-year repose provision depends on a number of factors, not all of which are within anyone's control and most of which have nothing to do with RCW 7.70.100. No two persons injured by health care negligence end up affected the same way by the repose provision. For any number of reasons, far fewer than all medical malpractice claimants end up having a full eight years to commence suit. Not only does the repose provision of RCW 4.16.350 confer no rights; as also explained in Part IV-B-6 of the Brief of Respondents Nicol and Valley Radiologists, in which Respondent MultiCare joins, there is no general "class" of eight-year-repose-period beneficiaries to which one can compare the Cunninghams or other medical malpractice claimants whose claims become barred less than eight years after the alleged injury-causing negligent act or omission.

(2) It is not irrational for the legislature to have provided in RCW 7.70.100(1) for extension of the limitations period but not the repose period.

A statute that distinguishes between similarly situated classes of persons will withstand a challenge based on Const. art. I, § 12 if it is rationally related to the achievement of a legitimate state interest. *Medina v. Public Util. Dist. No. 1*, 147 Wn.2d 303, 312-13, 53 P.3d 993 (2002); *Daggs*, 110 Wn.2d at 55. It is not MultiCare's burden to demonstrate that

such classification(s) as the Cunninghams may have identified is (or are) rationally related to a legitimate state interest. The Cunninghams bear that burden because statutes are presumed to be constitutional, *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 757, 131 P.3d 892 (2006), and thus to make rational distinctions. Thus, even if the effect of RCW 7.70.100 is to treat the Cunninghams and perhaps some similarly-situated medical malpractice claimants differently from other medical malpractice claimants, or from tort claimants generally, the Cunninghams must provide this Court with an articulable basis upon which it can rule as a matter of law, and beyond a reasonable doubt, that the classification into which they fall is not "rationally related to the achievement of a legitimate state interest." *Medina*, 147 Wn.2d at 313.

To pass muster under the "rational relation" test, the statute need not be logically consistent with its purpose in every respect, *Amunrud v. DSHS*, 124 Wn. App. 884, 888-89, 103 P.3d 257 (2004), *aff'd*, 158 Wn.2d 208, 143 P.3d 571 (2006), *cert. denied*, 549 U.S. 1282 (2007) (citing *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88, 75 S. Ct. 461, 99 L. Ed. 2d 563 (1955)), and the legislature need not have chosen the most effective way to achieve its goal, *Seeley v. State,* 132 Wn.2d 776, 795, 940 P.2d 604 (1997). A rational relationship may be found if "there is an evil at hand for correction, and that it might be

thought that the particular legislative measure was a rational way to correct it." *Seeley,* 132 Wn.2d at 801. A classification will be upheld against an equal protection challenge if there is "any conceivable set of facts that could provide a rational basis for the classification." *Medina,* 147 Wn.2d at 313; *Gossett v. Farmers Ins. Co. of Wash.*, 133 Wn.2d 954, 979, 948 P.2d 1264 (1997).

The evil that led the 2006 legislature to pass the bill which included the "notice of intent" requirement is the escalation in the cost that the public and the State pay for health care, with increasing numbers of people unable to afford health insurance or to pay for care out of pocket. The legislature's stated intention was "to provide incentives to settle [medical malpractice] cases before resorting to court." Laws of 2006, ch. 8, § 1; *see also id.* at § 314. As the legislature explained.

> [A]ccess to safe, affordable health care is one of the most important issues facing the citizens of Washington state . . . [T]he rising cost of medical malpractice insurance has caused some physicians, particularly those in high-risk specialties such as obstetrics and emergency room practice, to be unavailable when and where the citizens need them the most. The answers to these problems are varied and complex, requiring comprehensive solutions that encourage patient safety practices, increase oversight of medical malpractice insurance, and making the civil justice system more understandable, fair, and efficient for all the participants.

Laws of 2006, ch. 8, § 1. Seeking to provide an incentive to settle before filing a medical negligence claim promotes a legitimate state purpose. The Cunninghams make no effort to persuade this Court otherwise, and as explained more fully in Parts IV-B-2 and IV-B-3 of the Brief of Respondents Nicol and Valley Radiologists, in which Respondent MultiCare join, the notice of intent requirement furthers that purpose without imposing any substantial burden on claimants such as the Cunninghams.

Instead of trying to show that the notice of intent requirement fails to promote a legitimate state purpose, the Cunninghams assert, *App. Br. at 11-12* that:

> The fact that the Legislature extended the statute of limitation, but chose not to extend the statute of repose, means no notice of intention to commence can be provided after seven years and nine months, and this effectively limits the statute of repose period to seven years and nine months, contrary to law and RCW 4.16.350. This approach diminishes the rights of all citizens, dangerously extending a legislative agenda that unintentionally encroaches on constitutional guarantees that protect us all.

An argument based on "constitutional guarantees that protect us all" calls for some supporting authority, not to mention specificity. The Cunninghams provide neither. As already noted, it is not "contrary" to RCW 4.16.350 to give someone fewer than 96 months in which to commence suit for medical malpractice; most medical malpractice

claimants are afforded far less time in which to sue. And if what the legislature has done "diminishes the rights of *all citizens*," whatever problem there might be is not an equal protection problem.

The Cunninghams seem to argue, *App. Br. at 11-14*, that it is irrational for the legislature to provide through RCW 7.70.100 for an extension of the statute of *limitations* but not an extension of the eight-year *repose* period, such that the statute effectively shortens the repose period to 93 months from 96 months as to them but not as to every other medical malpractice claimant. If that is indeed the Cunninghams' argument, it is both insufficiently developed and without merit.

It is not irrational to allow for extension of the limitations period but not of the repose period because statutes of limitation and statutes of repose have different functions:

> As this court has explained, statutes of repose are "of a different nature than statutes of limitations." *Rice v. Dow Chem. Co.*, 124 Wn.2d 205, 211, 875 P.2d 1213 (1994). "A statute of limitation bars plaintiff from bringing an already accrued claim after a specific period of time. A statute of repose terminates a right of action after a specified time, even if the injury has not yet occurred." *Id.* at 211-212.

1000 Virginia Ltd. P'ship v. Vertecs Corp., 158 Wn.2d 566, 574-75, 146 P.3d 423 (2006). Because repose and limitations statutes have different functions, a legislative decision to make one more flexible than the other

is not patently irrational. The legislature has made a judgment that eight years is the maximum period within which to sue, that anyone whose claim is not barred by that eight-year limit would have the right to sue on an otherwise time-barred claim within five days after expiration of the RCW 7.70.100 notice-of-intent waiting period, and that the right to sue is lost after eight years even if discovery of a claim occurred too late to comply with RCW 7.70.100. Other than rhetoric and inapposite quotations, the Cunninghams articulate no reason why that was an irrational decision.

For these and the reasons set forth in Part IV-B-5 of the Brief of Respondents Nicol and Valley Radiologists, in which Respondent MultiCare joins, the notice requirement of RCW 7.70.100(1) does not violate equal protection under state or federal law.

d. The Cunninghams offer no "due process" argument that is not redundant with their "equal protection" argument.

The Cunninghams' "due process" argument, *App. Br. at 14-15*, is perfunctory and redundant with their "equal protection" argument. For the reasons set forth above and in Part IV-B-7 of the Brief of Respondents' Nicol and Valley Radiologists, in which Respondent MultiCare joins, the Cunninghams' "due process" argument should be rejected.

e. The Cunninghams' "separation of powers" argument is wholly inadequate to merit the Court's consideration.

The Cunninghams' "separation of powers" argument amounts to the assertion that the judicial branch has the exclusive constitutional authority "to establish its own rules of procedure and rules of evidence," *App. Br. at 15*; the assertion that the judiciary's rules may "contradict rules established by the Legislature," *id. at 16* (citing *Marine Power and Equip. Co. v. Industrial Indem. Co.*, 102 Wn.2d 457, 461, 687 P.2d 202 (1984)); the assertion that "the statutory context challenged in this appeal is an encroachment," *id. at 16,* and a plea for the Supreme Court to "flex" its authority "to protect and preserve the very foundation of the democracy that serves us all," *id. at 16.*

An argument based on a conflict between judicial and legislative rules ought to identify the judicial rule that is being overridden by the legislative one. The Cunninghams neglect to identify any judicially-established rules of procedure or evidence that are encroached upon or incompatible with RCW 7.70.100(1)'s 90 day waiting period requirement, with RCW 4.16.350's repose provision, or with the way those two

statutory provisions interacted in this case.[7] The Cunninghams thus fail to identify any separation-of-powers issue for the Court to resolve.

For the foregoing reasons, as well as those set forth in Part IV-B-8 of the Brief of Respondents Nicol and Valley Radiologists, in which Respondent MultiCare joins, the notice of intent to sue provision of RCW 7.70.100(1) does not establish, singly or in combination with the eight-year repose provision, violate separation of powers.

V. CONCLUSION

For the reasons set forth above, the superior court's order dismissing the Cunninghams' complaint for noncompliance with RCW 7.70.100 was correct and should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of September, 2009.

WILLIAMS, KASTNER & GIBBS PLLC

By _____
Mary H. Spillane, WSBA #11981
Daniel W. Ferm, WSBA #11466

Attorney for Respondent MultiCare Health System, Inc. d/b/a Covington MultiCare Clinic

Two Union Square
601 Union St., Suite 4100
Seattle, WA 98101
(206) 628-6600

[7] By contrast, plaintiffs/appellants in *Waples* and other cases have argued that RCW 7.70.100 and/or RCW 7.70.150 conflict with CR 8(a) and/or with CR 11.

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the State of Washington that on the 30th day of September, 2009, I caused a true and correct copy of the foregoing document, "Brief of Respondent MultiCare Health System, Inc. d/b/a Covington MultiCare Clinic," to be delivered via U.S. Mail to the following counsel of record:

Counsel for Appellants:
Jerald D. Pearson, WSBA #8970
PEARSON LAW FIRM PS
35131 SE Douglas St Ste 103
Snoqualmie WA 98065-9233
Ph: (425) 831-3100

Counsel for Respondents Ronald Nicol, M.D. and Valley Radiologists, Inc.:
Elizabeth A. Leedom, WSBA #14335
Jennifer Lynn Moore, WSBA # 30422
Michael F. Madden, WSBA #08747
Amy Magnano, WSBA # 38484
BENNETT BIGELOW & LEEDOM PS
1700 - 7th Ave Ste 1900
Seattle WA 98101-1355
Ph: (206) 622-5511

Co-counsel for Respondents MultiCare Health System, Inc. d/b/a Covington MultiCare Clinic:
John A. Rosendahl, WSBA # 09394
Timothy L. Ashcraft, WSBA # 26196
Williams Kastner & Gibbs
1301 A St Ste 900
Tacoma WA 98402-4299
Ph: (253) 593-5620

Dated this 30th day of September, 2009 at Seattle, Washington.

Carrie A. Custer
Carrie A. Custer